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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6725

ANDREW PHILLIP LEGARE,

Petitioner,

vs.

WALTER B. ZANT, Superintendent,
Georgia Diagnostic & Classification Center,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

I. Whether the Death Penalty as Applied to a 17-year-old Child is Cruel and Unusual Punishment under the Eighth Amendment to the Constitution of the United States.

II. Whether the Constitution Requires that a Sentencing Jury Be Permitted to Consider the Youth of the Defendant in Mitigation.

III. Whether, in this Capital Case, the Failure of Defense Counsel to Introduce Any Mitigating Evidence Whatsoever in the Punishment Phase of the Trial, Notwithstanding the Abundant Availability of Such Evidence, Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

IV. Whether, in Light of the Invalidity of the (b)(7) Aggravating Circumstance in this Case Under this Court's Decision in Godfrey v. Georgia, the Georgia Courts May Constitutionally Reaffirm the Death Sentence, with No New Sentencing Determination, on the Basis of the (b)(2) Aggravating Circumstance.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner, Andrew Phillip Legare, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in this case on February 24, 1981.

OPINION BELOW

The decision of the Supreme Court of Georgia affirming Petitioner's conviction is reported at 243 Ga. 744, 257 S.E.2d 247 (1979), cert. denied, 444 U.S. 984 (1979), and is set out in the Appendix, infra, pp. 1a-9a. The opinion of the Superior Court of Butts County denying Andrew Legare's petition for a writ of habeas corpus is unreported and is set out in the Appendix, infra, pp. 10a - 18a. The Order of the Supreme Court of Georgia denying a certificate of probable cause to appeal is set out in the Appendix, p. 19a.

JURISDICTION

The judgment of the Supreme Court of Georgia denying a certificate of probable cause to appeal was entered on February 24,

1981. This Court's jurisdiction rests upon 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Nor cruel and unusual punishments inflicted;"

the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "No state shall . . . deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;"

and the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

2. This case also involves the following provisions of the statutes of the State of Georgia:

> Ga. Code Ann. § 27-2534.1 Mitigating and aggravating circumstances; death penalty
>
> "(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
>
> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> . . .

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

. . .

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

. . .

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed. (Acts 1973, pp. 159, 163.)"

STATEMENT OF THE CASE

A. The Crime.

The evidence submitted at trial in this case showed that Andrew Legare, seventeen years and two months old at the time, fled from the Youth Development Center ("YDC") in Milledgeville, Georgia, at about 1:00 a.m. one chilly May morning in 1977. Another boy, Roger Horne, escaped at the same time. Andrew was clad in only his undershorts and was lost in the woods for the rest of the morning. Near daybreak Andrew saw a local resident leave his home. Andrew knocked on the front door. When no one answered, he entered the house through a window. Andrew took some clothes and a checkbook, cut his hair and fell asleep. The man returned unexpectedly, before noon, and a struggle ensued in which the man was beaten with a blunt instrument. Andrew fled, with the man calling for help.

Andrew took the man's car, drove out of Milledgeville in a frantic condition, and headed south. Neighbors came in response to the injured man's cries. He was taken to the Baldwin County Hospital and then transferred to a hospital in Macon, where he died the next day. Andrew was apprehended in Florida and brought back to Milledgeville where he was indicted in Baldwin County Superior Court for burglary, robbery and murder. Prosecutor Joseph Briley indicated that he would seek the death penalty.

B. The Defendant.

Although the jury which convicted Andrew and sentenced him to death knew essentially nothing about him beyond the facts that he had escaped from the YDC and that he was involved in the death of a man and the theft of his car, substantial evidence in mitigation was available at the time this case was tried and has been introduced into the record in the habeas corpus proceeding below. This evidence would have demonstrated to the jury that Andrew is intelligent and concerned about others, that, despite a very troubled family background, he has no history of serious violent crime, that he has never physically injured anyone previously, and that his involvement in the crime in question, though certainly not excusable, was much less reprehensible than the prosecutor forcefully argued.

Andrew had just turned 17, inside the YDC at Milledgeville, when this crime occurred. Andrew's testimony at the June 10, 1980 state habeas corpus hearing and the ten affidavits in this habeas corpus record from friends, acquaintances, and teachers of Andrew demonstrate that Andrew had a very troubled family background. These affidavits, totally and erroneously

ignored in the orders of the courts below, help to explain the various difficulties Andrew encountered as a boy in Massachusetts, and show also that Andrew is a good person with many positive qualities. When the full story is told, as it was not at trial, Andrew is seen as a troubled youth with a real potential for making a positive contribution to society. He has shown substantial growth in maturity and judgment during the years of his incarceration. Indeed, since the habeas corpus hearing in this matter, Andrew has been awarded a degree through the Graduate Equivalency Degree program, based on courses and tests he took while in prison, with an exceptionally high score.

C. The Trial.

1. Voir Dire.

The trial of Andrew Legare took place in three and one-half extremely long days during Thanksgiving week of 1977. The first day of the trial was taken up with a truly remarkable voir dire performance by prosecutor Briley which is described further below. Fifty-three jurors were examined and almost every one of them was asked by the prosecutor, in the presence of all of the others, if the fact that the defendant was 17 years old would affect their decision on whether or not to impose the death penalty. Those few who responded that the youth of the defendant would have some effect were struck by the state, so the resulting jury had effectively promised not to consider Andrew's youth in the death penalty determination. The Monday session ended after 10:00 p.m., November 21, 1977.

2. Guilt/Innocence.

On Tuesday, beginning early in the morning, a succession of prosecution witnesses testified in detail about the blood on the floor of the victim's house and about the pitiful state of the victim after the struggle. Roger Horne, the other boy who escaped with Andrew, testified that the two had quickly separated and that Horne had never gone near the house. This session ended Tuesday evening at approximately 11:30 p.m.

Wednesday began with testimony from a police officer, offering some substantial corroboration for Horne's story. Andrew Legare then testified that he and Horne had been in the victim's house when the man returned and that Horne had done the beating.[1] During the course of the proceedings on Tuesday and Wednesday, defense counsel on several occasions sought continuances to interview newly-named witnesses. These requests were all effectively denied by the trial judge, who manifested an intention to get the trial over with as soon as possible.

After dinner on Wednesday evening, the time arrived for closing arguments on guilt/innocence. After an inexcusably overreaching closing argument by the prosecutor, in which he referred to the defendant, inter alia, as "a sheep killing dog,"

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[1] At the habeas corpus hearing on June 10, 1980, Andrew's testimony differed on this point, in that he conceded that Horne had not been in the house. Andrew testified that he was asleep when the man returned and awoke when the man approached him with a stick, that he then struggled with the man and wrested the stick from him, that he then wrested from the man a crowbar with which the man was attempting to hit him, and that he then struck the blows which rendered the man unconscious. This change of testimony does not affect the constitutional issues presented by Andrew's petition for a writ of habeas corpus and present petition for a writ of certiorari, which concern the sentence imposed and do not attack on substantive grounds the determination of guilt.

and smashed an egg before the jury to demonstrate an "eggshell fracture," the jury returned its verdict of guilty on all three counts at about 10:30 p.m. on Wednesday night.

3. Sentencing.

After the guilty verdicts were returned late on Wednesday night, the night before Thanksgiving, the court proceeded directly to the sentencing phase of the trial. Although the jury had been exposed to Andrew Legare only in connection with his testimony concerning the escape and the beating, and had no other information about Andrew, the defense did not put on any evidence in mitigation. As explained by trial counsel's associate at the hearing on the habeas corpus petition, the failure to put on evidence in mitigation was due in part to the lateness of the hour and in part to the inability of trial counsel, under the circumstances, to prepare adequately for the sentencing phase. Of the ten individuals who filed affidavits in the habeas proceeding, testifying that they knew Andrew well and considered him to be a good person, only one had been contacted by trial counsel, and that was Andrew's mother.

The closing argument of the prosecutor in the penalty phase was also incredibly overreaching. He reminded the jurors repeatedly that each one of them had promised not to consider the fact that the defendant was a youth when it came to the sentencing phase of the trial, and that each of them had promised to consider Andrew's punishment as if he were a thirty year old man. He emphasized in the grizzliest possible terms the bloody scene at the home and the pitiful condition of the victim after the beating. He urged the jurors to apply the death

penalty as a matter of their civic duty, so that in the future if someone from outside (Andrew was from Massachusetts) drifted to the South, he would at least know that capital punishment is imposed in Baldwin County. He concluded by urging the jury again to "disconsider his age, disconsider all of those things which you're not supposed to consider," and to "push the age of the defendant out of your mind."

At about 1:00 or 1:30 a.m. on Thanksgiving morning, the jury returned with the finding that the murder had been committed in the course of an armed robbery and burglary, as specified under statutory aggravating circumstance (b)(2), Ga. Code Ann. § 27-2534.1(b)(2), and that the murder involved "inhuman or vile torture to victim," apparently meant to relate to statutory aggravating circumstance (b)(7). The court and the prosecutor informed the jury foreman that the verdict was "not exactly in the proper form," and coached the foreman in writing out the full statutory language of (b)(7). The trial judge thereafter sentenced Andrew to death at approximately 1:30 a.m. on Thanksgiving morning.

D. Subsequent Proceedings.

Andrew's motion for a new trial was denied. His conviction and sentence were affirmed on direct appeal by the Georgia Supreme Court. 243 Ga. 744 (1979). None of the issues put forward in this petition for a writ of certiorari were raised or adjudicated in the direct appeal. A petition for certiorari to this Court, raising only the issue of the propriety of the death penalty in a case of vicarious liability, was denied. No rehearing was sought. Promptly on receiving the remittitur,

Trial Judge Duke set the execution date for 12 days later, February 20, 1980. Andrew then filed his habeas corpus petition in the Butts County Superior Court and the execution date has been stayed by order of that court. After hearing on the petition on June 10, 1980, post-hearing briefs were filed and the court denied Andrew's petition by order dated October 13, 1980. A petition of a certificate of probable cause to appeal under Ga. Code Ann. § 50-127(11) was timely filed, and was denied by the Georgia Supreme Court, without opinion, on February 24, 1981.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

None of the questions presented in this Petition for Certiorari was raised at petitioner's trial, in his motion for a new trial, in his initial direct appeal to the Georgia Supreme Court, nor in his initial petition for certiorari to this Court. Each of the quertions presented in this Petition, however, was expressly raised in petitioner's Petition for Habeas Corpus filed in the Superior Court of Butts County. The Superior Court of Butts County in its order denying writ of habeas corpus expressly reached issues II, III, and IV and denied relief. The Superior Court ignored the first issue. Each of these issues was also expressly presented and argued to the Georgia Supreme Court in Petitioner's Application for a Certificate of Probable Cause to Appeal. The Georgia Supreme Court d ied the Application without opinion.

Paragraph and page citations to the Petition for Habeas Corpus ("P.H.C."), Memorandum of Law in Support of Petition for Writ of Habeas Corpus ("Memo. P.H.C."), Order of Superior

Court denying the Petition for Writ of Habeas Corpus ("Spr. Ct. Order"), and Application for Certificate of Probable Cause to Appeal to the Georgia Supreme Court ("App. to Appeal") where the issues presented here were raised, and summarizations of the way in which they were decided by the Superior Court are as follows:

I. Whether the death penalty as applied to a 17-year-old child is a cruel and unusual punishment under the Eighth Amendment to the Constitution of the United States. P.H.C. ¶16, p. 7; Memo P.H.C., p. 21 & n. 5; ignored in Superior Court Order; App. to Appeal, ¶ II.J.4., pp. 15-16.

II. Whether the Constitution requires that the sentencing jury be permitted to consider the youth of the defendant in mitigation. P.H.C. ¶¶11(a), 12(a), 13(c),(d), 23, pp. 3-6, 9 and ¶ 13(g) of Amendment to Petition for Writ of Habeas Corpus; Memo P.H.C., pp. 21-23; Spr. Ct. Order, pp. 14a-16a (The Superior Court relied on the fact that the state's strikes of the only jurors who might consider youth in mitigation were peremptory, not for cause, and the court ignored entirely the effect of the prosecutor's closing arguments, which had been strenuously argued); App. to Appeal, ¶II.A., pp. 5-6.

III. Whether, in this capital case, the failure of defendant's counsel to introduce any mitigating evidence whatsoever in the punishment phase of the trial, notwithstanding the abundant availability of such evidence, violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. P.H.C. ¶¶13(a)(b), 14, pp. 5-6 and ¶11(i) of Amendment to Petition for Writ of Habeas Corpus, Memo P.H.C., pp. 23-26; Spr. Ct. Order, pp. 15a-17a (The Superior Court found this to have been a tactical decision by trial counsel, and

found overall that trial counsel was not ineffective.);App. to Appeal, ¶II.B, p. 7.

IV. Whether, in light of the invalidity of the (b)(7) aggravating circumstance in this case under this Court's decision in Godfrey v. Georgia, the Georgia courts may constitutionally reaffirm the death sentence, with no new sentencing determination, on the basis of the (b)(2) aggravating circumstance. P.H.C. ¶15, p. 7; Memo P.H.C., pp. 11-20; Spr. Ct. Order, pp. 11a-13a (The Superior Court determined that the (b)(2) aggravating circumstance found by the jury provided adequate ground for the death penalty to be affirmed, even assuming that the (b)(7) circumstance was invalid; alternatively, the Superior Court added that the (b)(7) circumstance was valid in the circumstances of this case.); App. to Appeal, ¶II.C., pp. 8-9.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Certiorari to Consider Whether the Death Penalty as Applied to a 17-year-old Child is Cruel and Unusual Punishment under the Eighth Amendment to the Constitution of the United States.

Andrew Phillip Legare was seventeen years and two months old when he committed the murder for which he has been sentenced to die. His childhood had been marred by the early divorce of his parents, a deprived upbringing, and by the emotional turmoil that resulted from being moved back and forth between his separated parents and the various foster homes.[2/]

[2/] These aspects of Andrew's life are described in his testimony at the habeas corpus hearing and in the affidavits submitted in this proceeding on his behalf, but were not before the sentencing jury.

This Petition raises the question of whether, in light of the "evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958), a state may continue to countenance the imposition of the death pealty upon a child. The Court has recently granted certiorari to consider this question in connection with a sixteen year old in Eddings v. Oklahoma, 616 P.2d 1159 (Okla. Crim. App. 1980), cert. granted, 49 U.S.L.W. 3743, 3775 (April 6, 1981, No. 80-5727). Petitioner submits that for a number of compelling reasons, discussed more fully below, the line should be drawn between ages 17 and 18. In order to resolve this important constitutional issue in a timely and efficient manner, this Court should grant certiorari to review this case in conjunction with Eddings.

The notion that the Eighth Amendment may forbid the imposition of death as cruel and unusual for certain offenses is not, of course, a new one. In Coker v. Georgia, 433 U.S. 584, 592 (1976), this Court determined that the Constitution prohibited the imposition of the death penalty upon rapists because it was "excessive" or "grossly out of proportion" to the crime. As in Gregg v. Georgia, 428 U.S. 153 (1976), the Court in Coker looked to "objective factors" including "public attitudes concerning a particular sentence, history and precedent, legislative attitudes and the response of juries reflected in their sentencing decisions," Coker v. Georgia, supra, 433 U.S. at 592, to determine whether the punishment imposed was excessive.

The gross disproportionality of child executions is evidenced by widespread state statutes and policies which protect juveniles from criminal court proceedings, by nationwide legislative, executive and judicial recognition of a defendant's

youth as an important mitigating factor in capital and non-capital cases (as discussed more fully under heading II., infra), by international condemnation of child execution, and by the strong reluctance of American courts and juries to sentence children to death. The extreme rarity of such sentences and the large number of children who are automatically disqualified from being considered for the punishment operates to make the imposition of death in cases involving young persons "freakish" in its rarity. Furman v. Georgia, 408 U.S. 238, 310 (1972) (Stewart J., concurring).

In virtually every state, juvenile statutes have long been in operation to protect delinquent children from adult criminal proceedings. Many states provide for some form of judicial waiver or certification procedure, usually with a minimum age limitation below which the juvenile is totally insulated. Other states provide for some form of legislative waiver of juvenile proceedings, with age limits depending on the type of crime or punishment.3/

The juvenile laws are rehabilitative in nature, based on the assumption that children and adolescents are not wholly responsible for their actions, and that they deserve the opportunity for guidance and reform, so as to have the chance to lead productive adult lives.4/ The rehabilitative theory of punishment is perhaps best suited to the juvenile offender, since rehabilitation techniques may gave a greater chance of

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3/ See Feld, "Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions," 62 Minnesota Law Review 515-56 (April-July, 1978), especially p. 526 (no. 38) and p. 556 (n. 131). This article also outlines the history of the "rehabilitative ideal" in juvenile statutes.

4/ Feld, supra, at 516.

success if begun while the child's personality is still in a state of relative flux. As is true in Andrew Legare's case, the juvenile offender is often the product of traumatic and underprivileged circumstances beyond his control and is uniquely deserving of a second chance.

The reluctance of the states to mete out their harshest remedies upon their children is further evidenced by the widespread specification of age as an absolute preclusion or as a mitigating factor in the application of the death penalty. Several states specifically prohibit the imposition of the death penalty on children under sixteen, seventeen or eighteen years of age.[5/] Over thirteen states have by statute specified defendant's youth as a mitigating factor in capital sentencing.[6/]

The Georgia Legislature in 1963 enacted a statute which prohibited the execution of persons under the age of seventeen at the time of the commission of the offense. Ga. Laws 1963, p. 122, amending Ga. Code Ann. § 26-1005 and § 27-2302. Section 26-1005 was subsequently repealed as part of a general revision of the Georgia criminal code; § 27-2302 was amended by the publisher of the Georgia Code to delete the 1963 provision, and was subsequently reenacted by the legislature in the publisher's form. Two Justices of the Georgia Supreme Court have

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5/ See, e.g., Nev. Rev. Stat. §176.025 (1973 & Supp. 1977); Tenn. Code Ann. 39-2404(h)(i)(1) (Supp. 1977); Tex. Penal Code tit. 1 §807(d) (Vernon Supp. 1978).

6/ See Conn. Gen. Stat. Ann. §63a-46a(f)(1) (West. Supp. 1978); Fla. Stat. Ann. §921.141(6)(g) (West Supp. 1978); Ill. Ann. Stat. ch. 39 §9-1(b) (Smith Hurd Supp. 1978); Ky. Rev. Stat. Ann. §532.025(b)(8); La. Code. Crim. Pro. art. 905.5(f) (Supp. 1978); Md. Ann. Code art. 27 §134(b)(2) (Supp. 1977); Mo. Ann. Stat. §565.012(3)(7) (Vernon Supp. 1978); Neb. Rev. Stat. §29-2523(2)(d) (1975); N.C. Gen. Stat. §15A 2000(f)(7) (1978); 18 PA. Cons. Stat. Ann. §1311(d)(2)(i) (Supp. 1978); Utah code Ann. § 76-3-207(1)(e) (Supp. 1977); Wash. Rev. Code. 9A.32.045 (2)(g) (Supp. 1978); Wyo. Stat. Ann. §6-4-102(j)(vii) (1977).

stated the view that the 1963 statute remains the law in Georgia, but that view has not won majority support. See Lewis v. State, 246 Ga. 101, 107, 268 S.E.2d 915 (1980) (Hill, J., concurring specially); Hawes v. State, 240 Ga. 327, 337, 340, 240 S.E.2d 833 (1977) (Hall, J., and Hill, J. concurring specially). Justice Hill adds the following comment on the current position of the State of Georgia:

> "The state argues that 'Succinctly stated, Georgia law no longer precludes the execution of youthful defendants ...' down to and including age 13. I shudder at the cruelty of my government."

Hawes v. State, supra, 240 Ga. at 341 (Hill, J., on motion for rehearing, concurring specially).

The Model Penal Code recognized, as early as 1962, "the youth of the defendant at the time of the crime," to be a mitigating circumstance, ALI Model Penal Code § 210.6 (Proposed Official Draft 1962). This Court has also noted, on several occasions, the importance of the defendant's youth as a mitigating factor in capital sentencing. See, e.g., Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 (1976). Lenient state policy towards juvenile murder defendants is further reinforced by the high rate of executive commutations of the death penalty for applicants under the age of 20.7/ Executive pardon is presently available for a youth in every state that permits capital punishment.

Execution of the young is repudiated not only throughout most of the United States, but in other countries as well. On October 5, 1977, President Jimmy Carter signed the International

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7/ H. Bedau, The Death Penalty in America, 420 (Anchor Books 1967).

Bill of Human Rights. Part III, Article 6, Clause 5 of the Covenant provides that "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women." International Bill of Human Rights, New York: United Nations, 1978 (p.23) (emphasis added). In reserving the right of the United States to "impose capital punishment on any person duly convicted," the State Department noted that the purpose of the reservation "was certainly not the preservation of any right to execute children or pregnant women, something never done in the United States." International Human Rights Treaties, Hearings before the committee of Foreign Relations, 96th Congress, First Session, November 14, 15, 16, and 19, 1979 (p. 55).

To date, the Covenant of Civil and Political Rights has been signed and/or ratified by 73 nations, including Great Britain, West Germany, Japan, Israel, and the U.S.S.R.[8]/

The framers of the Eighth Amendment were familiar with a legacy of brutal and excessive punishments which led to the adoption of the English Bill of Rights in 1689. The English legal system had discriminated little on the basis of age: "Adolescents as well as children could be -- and actually were -- sentenced to death and even executed."[9]/ Yet even in the 1600's, the execution of children was abhorred by public sentiment.[10]/

8/ See generally Weissbrodt, "U.S. Ratification of the Human Rights Covenants" 63 Minn. Law Review 35 (1978). The U.S. Congress has not yet ratified the Covenant on Civil and Political Rights. See "Multilateral Treaties in Respect of which the Secretary General Performs Depositary Functions; List of Signatures, Ratifications, Accessions, ets. as at 31 December, 1979." New York: United Nations, 1980, (pp. 111-112).

9/ L. Radzinowicz, A History of English Criminal Law, VOL. 1: "The Movement for Reform" 11 (London, 1948).

10/ L. Radzinowicz, supra, at 13.

The actual imposition of the death penalty upon children has become so rare in this country as to be practically nonexistent. A history of execution in the United States shows only twelve executions of sixteen year old children (and only one child younger than sixteen has ever been executed) out of 5,706 total United States executions, and 3,128 total executions for which age data is available. The most recent child execution occurred in 1948. 11/

The decline in the number of young persons executed is reflected in the total figures for all persons under the age of twenty. Prior to 1950, 229 teenagers were executed (out of 2,678 executions with available age data). Since 1950, only 26 teenagers have been executed (out of 450 executions with available age data) 12/ As of December 31, 1979, only eleven prisoners out of 567 on death row were under twenty years of age.13/

Specific data compiled by Ms. Patsy Morris of the American Civil Liberties Union in Georgia, showing the date of offense and date of birth for each of 92 Georgia defendants presently under sentence of death, reveal that only two such defendants were younger at the time of the commission of the offense than was Andrew Legare. In contrast, at least twenty Georgia Supreme Court cases decided after 1974 can readily be cited in which youthful defendants (seventeen or younger) convicted of murder received only life sentences. These cases of course exclude the many life sentences from which no appeal was taken and the opinions as to which the age of the defendants are not made clear.

11/ W. Bowers, Executions in America, (Lexington, Mass. 1974).

12/ W. Bowers, supra note 11.

13/ United States Department of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1980, p. 203 (101st ed.)

The petitioner submits that the execution of a seventeen year old offender in the year 1981 shocks the conscience and constitutes cruel and unusual punishment. The execution of American children is nonexistent in practice and is barred by every modern constitutional standard for capital sentencing. The Court should grant certiorari to consider whether the State of Georgia may constitutionally be permitted to enforce this freakish penalty in petitioner's case.

As noted, this important constitutional question--the propriety of the execution of a child--is now before this Court in Eddings v. Oklahoma, No. 80-5727. Monty Eddings was sixteen years old at the time of the offense for which he was sentenced to die. Andrew Legare was seventeen years, two months old at the time of the offense in this case. Petitioner respectfully submits that the constitutional line drawn by evolving standards of decency should preclude execution of any youths under 18. That is the line drawn for many other signficant societal purposes, both by the federal government and by the states, and, as noted above, by civilized nations throughout the world with respect to the death penalty. Eighteen is the age in this country for voting, for military service, in most jurisdictions for jury duty, and in many jurisdictions for marriage without parental consent and for purchase of alcohol. It is the age at which this society assigns full responsibility to an individual for his actions--the law and our society recognize that prior to the age of eighteen, a youth is deserving of special protection and consideration from society and its laws.

In order to draw the line clearly, this Court should have before it, with Eddings, this case, which squarely presents the question of the constitutionality of the death penalty as imposed on a seventeen year old child.

II. The Court Should Grant Certiorari to Consider Whether the Constitution Requires That a Sentencing Jury Be Permitted to Consider the Youth of the Defendant in Mitigation.

Should this Court ultimately rule in Eddings or in this case that the death penalty may constitutionally be imposed upon a seventeen year old, such a ruling should be accompanied by a clear reaffirmation that youth is a factor which the jury must be permitted to consider in mitigation. This case provides an opportunity for such a holding, as the record clearly establishes that the prosecutor repeatedly instructed the jury, without contradiction by the trial court or defense counsel, that the jury was not allowed to consider the defendant's youth in mitigation. This important federal question, erroneously decided by the courts below, is one which logically and in the interests of judicial economy should be considered in conjunction with those presented in Eddings and in Issue I, above.

The record from the trial of this case shows that the prosecutor, on voir dire, asked almost every prospective juror whether the defendant's youth would have any effect on that juror's consideration of whether the death penalty should be imposed.

The following are examples of the types of questions asked by prosecutor Briley on voir dire, all of individuals who became actual jurors (page references are to the trial transcript):

BARBARA PICKMAN (p. 58)

> Q. Mrs. Pickman, would the fact, if the evidence showed in this case, that the defendant was 17 years of age, would that influence you in reaching a verdict based on the evidence in the case?
>
> A. No.

Q. You say it would it would not?

A. No.

Q. Now, the State is asking for the death penalty in this case, would the age of the defendant, if the evidence shows that he is 17, would that age make it unlikely for you to consider the death penalty?

A. No.

Q. You could, regardless of the age consider the death penalty as one of the penalties if the evidence warrants it?

A. Yes.

MOLLIE LAWRENCE (p. 114-15)

Q. Let me ask you this question, would the fact, if the evidence shows that the defendant in this case was a 17 year old boy, would that influence your decision in this case?

A. No, it wouldn't.

Q. When it came to the penalty in the event that you served on the jury, and that jury found the defendant quilty as charged, and then it came----the responsibility of the jury to determine the punishment could you consider the death penalty along with the other alternatives, or the fact that he was 17 preclude you from fairly considering the death penalty?

A. No, it wouldn't have anything to do with it.

Q. Thank you.

CHRISTINE GLENN (p. 121)

Q. If you were selected to serve on this jury, would the fact that the defendant is 17 years old, would that influence you in your deliberations in your decision?

A. No.

Q. Would his age have any influence on you as to the penalty that would be recommended?

A. No.

As the Superior Court found, p. 14a-15a, infra, these types of questions and answers were repeated approximately 43 times before all prospective jurors. The few prospective jurors

who said they would consider the defendant's youth were struck by the state.

The resulting jury was composed of 12 individuals who had promised the prosecutor not to consider the defendant's youth when making with the death penalty decision. In closing argument, the prosecutor repeatedly reminded the jurors of this promise, for example, in the following statements:

> I asked each and every one of you that if because of the age of the defendant in this case, you would be more likely to vote against the death penalty for him than you would, say, a thirty year old man, or words to that effect. I asked each one of you and each one of you said no, that you would judge this defendant on the basis of the evidence of the crime he was alleged to have committed. You have done that. And I thank you for that. (Supplemental Transcript, "S.T.", p. 70).

> And you'll have the satisfaction of knowing that you have, in a case where the evidence demanded, not only justified, but demanded the death penalty, if you disconsider his age, disconsider all of those things which you're not supposed to consider, and consider only the evidence you will know and have the satisfaction of knowing that you returned a just verdict. (S.T., p. 78; emphasis added).

> Just remember the evidence. Do what you said you would do. Push the age of the defendant out of your mind. He may be seventeen years chronologically but he's older than any of us in the ways of evil and his malicious conduct. He's older than the oldest of us. (S.T., p. 79).

The only guidance for the jury from the trial court on this point came when the court sustained the prosecution's objection to defense counsel's reference, in closing argument, to the age of the defendant. S.T., pp. 82-83.

The Georgia statutory sentencing procedures provide that the sentencing authority shall consider "any mitigating circumstances," Ga. Code Ann. § 27-2534.1, but the jury in Andrew's case was precluded from considering the age of the

defendant. As the Georgia Supreme Court has recently stated, "The jury must be allowed to consider mitigating circumstances. . . . Age (youth) is a mitigating circumstance." Lewis v. State, 246 Ga. 101, 104, 268 S.E.2d 915, 919 (1980).

Numerous opinions of this Court recite the same constitutional requirement. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978) (one factor noted by the Court in invalidating the Ohio death statute was that consideration of defendant's age was not permitted to affect the sentencing decision); Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 (1977) (in invalidating Louisiana's statute providing for an automatic death penalty for killing a police officer, the Court stated, "Circumstances such as the youth of the offender ... are all examples of mitigating facts which might attend the killing ..."); Gregg v. Georgia, 428 U.S. 153, 197 (1976) (in upholding the Georgia death statute, the Court noted that the jury was allowed to consider mitigating circumstances, including youth); Jurek v. Texas, 428 U.S. 261, 272-73 (1976) (the constitutionality of the Texas death sentencing procedures turned on whether the statute allowed consideration of "particularized mitigating factors"; in upholding the Texas death statute, the court noted that the jury could consider, inter alia, the age of the defendant).

The principle that youth must be considered in mitigation is a corollary of this Court's frequent admonition to the effect "that in capital cases it is constitutionally required that the sentencing authority have information sufficient to enable it to consider the character and individual circumstances of a defendant prior to imposition of a death sentence," Gregg v. Georgia, 428 U.S. 153, 189 n. 38 (1976). These general principles are discussed further under Issue III, infra.

The Superior Court of Butts County in its order stated that "the question by the prosecutor on the mitigating factor of age did not render the jury impaneled to try the Defendant constitutionally infirm." Appendix, infra, p. 16a. Apparently on that analysis the court rejected Legare's contentions concerning the improper preclusion of the possibility of the jury considering the defendant's youth in mitigation. The Superior Court simply ignored important aspects of this argument and reached a result which is clearly at odds with controlling United States Supreme Court precedent. The Georgia Supreme Court similarly ignored that precedent in denying without opinion Legare's application for a certificate of probable cause to appeal, which presented this issue at length.

Should this Court decide that it is constitutionally permissible to inflict the death penalty upon a seventeen year old, this Court should reaffirm that the jury, at a minimum, must be permitted to consider the defendant's youth as a mitigating factor.

III. The Court Should Grant Certiorari to Consider Whether, in this Capital Case, the Failure of Defense Counsel to Introduce Any Mitigating Evidence Whatsoever in the Punishment Phase of the Trial, Notwithstanding the Abundant Availability of Such Evidence, Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

On this important and recurring constitutional issue, the courts below are at odds with direct precedent in federal courts and with the clear import of recent death penalty cases in this Court. This Court should grant certiorari to resolve this important question.

No evidence was presented in mitigation during the sentencing phase of this trial. The Georgia statute and the construction it has been given by the Georgia Supreme Court and this Court clearly entitles a defendant to place before the jury

any information about the defendant which might incline the jury to be merciful in recommending a lesser sentence than death.

The defense team had available to them numerous very supportive witnesses from Massachusetts and elsewhere, whose names, addresses and telephone numbers could have been easily obtained. Counsel did in fact obtain some of the names, but did not follow up on any of them. Affidavits were submitted in connection with the petition for habeas corpus from, inter alia, the following individuals, all of whom were eager to testify for Andrew at trial in 1977, and whose testimony clearly would have helped to present to the jury the picture of Andrew Legare as an individual whose life was worth saving:

> Patricia Siano (Andrew's mother, who was present at the trial);
>
> Marie Tougas (Andrew's English teacher, who has traveled from Massachusetts to Georgia on two occasions to visit Andrew in prison);
>
> Mary Supernaut (Andrew's foster mother);
>
> Father Joseph Drohan (a priest who visited Andrew in the Baldwin County Jail);
>
> Cynthia Ann Roy (a good friend in Massachusetts);
>
> Barbara Roy (Cynthia's mother, who knew Andrew well);
>
> Pauline Lacus (another friend in Massachusetts);
>
> James Doyle (a Massachusetts friend now serving in the armed forces in Alaska); and
>
> Marie Legare (Andrew's grandmother).

These affidavits, in addition to the testimony of Andrew Legare himself at the hearing in this matter, demonstrate that a substantial number of mitigation witnesses could have

been developed for use in the November, 1977 hearing and would be available at a new sentencing hearing. Andrew Legare himself could have given a very effective plea for mercy in his own behalf if permitted to testify in the sentencing phase, but instead the jury heard him only during his testimony about the escape from the YDC and the crime.

The record shows that these mitigation witnesses and others could have testified in detail and with specific examples: (1) that Andrew had a very troubled family background, which, considered with his youth, tended to lend sympathy to the manner in which he had found himself in such an unfortunate situation; (2) that Andrew was very intelligent, interested in learning, capable of rehabilitation, and had ambitions for the future; (3) that Andrew was caring and affectionate; and (4) that Andrew had no significant history of violent or serious crime. In all probability such testimony by these witnesses would have swayed the jury against the imposition of the death penalty.

The record amply supports the suggestion that trial counsel did not do what is minimally expected in the way of reasonably effective assistance in connection with the sentencing phase of trial, and petitioner is thereby entitled to relief. The District Attorney had indicated from the outset that he was seeking the death penalty, and it must have been recognized by counsel that a conviction was certainly a possible outcome of the guilt/innocence phase of the trial. Andrew Legare's life was clearly at stake. Mr. Mangum, who assisted in the defense, admitted in the habeas hearing that a number of things should have been done with respect to the sentencing phase which were not done. (Habeas Hearing Transcript, p. 103)

The failure to introduce any of this evidence was surely influenced by the limited resources and difficult conditions with which trial counsel were required to work. Most of the mitigation witnesses were in Massachusetts (Andrew Legare's home). The timing and pace of the trial were terrible--the sentencing hearing was conducted early Thanksgiving morning, after the verdict of guilt had been returned late Wednesday night. The conditions of the trial and of the representation thus played some part in rendering counsel ineffective, but the clear result was that Andrew Legare was denied effective assistance of counsel in connection with the sentencing phase of the trial, in violation of his Sixth, Eighth and Fourteenth Amendment rights.

In holding the Georgia capital punishment statute constitutional in Gregg v. Georgia, 428 U.S. 153 (1976), this Court emphasized that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision." Id. at 190. As this Court explained in Woodson v. North Carolina, 428 U.S. 280, 304-05 (1976):

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of the faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v. Dulles, 356 U.S. at

> 100 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."

See also Lockett v. Ohio, 438 U.S. at 586, 604-05 (1978).

In Gardner v. Florida, 430 U.S. 349 (1977), this Court stated, "[i]t is...clear that...the sentencing process, as well as the trial itself must satisfy the requirements of the Due Process Clause...[S]entencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to effective asistance of counsel." Id. at 358; accord, Presnell v. Georgia, 439 U.S. 14 (1978).

In a recent decision, a United States District Court held that the failure of counsel to present any evidence of mitigating circumstances during the sentencing phase of a murder trial violated the defendant's sixth amendment rights. The court stated:

> Effective assistance ... requires zealous and not merely perfunctory or pro forma representation. ... [P]etitioner's trial counsel failed to present any evidence of mitigating circumstances, although an array of witnesses to testify in mitigation would have been readily available upon proper investigation. ...
>
> [W]e unhesitatingly believe that this lack of defense, at such a critical stage due to ineffectiveness of counsel, resulted in great prejudice to the petitioner. ... This amounts to a clear violation of petitioner's constitutional rights to effective assistance of counsel and due process.

Voyles v. Watkins, 489 F.Supp. 901, 912 (N.D. Miss. 1980); accord Blake v. Zant, _____ F.Supp. _____ (S.D. Ga., April 29, 1981, No. CV480-251).

In Andrew Legare's case, the jury was given essentially no information on which to evaluate the individual characteristics

of the defendant. Ignoring substantial aspects of this argument, the Superior Court reviewing the petition for a writ of habeas corpus found this contention without merit because, in essence, the court was unable to say that original trial counsel for Legare was a terrible lawyer. Appendix, pp. 16a-17a. That, of course, completely misses the point. The ineffective assistance of counsel in connection with the failure to produce mitigation evidence, aggravated by the trial court's handling of the case, clearly warrants the granting of Andrew Legare's petition for certiorari and the ultimate reversal of the Superior Court's denial of the writ.

IV. The Court Should Grant Certiorari to Consider Whether, in Light of the Invalidity of the (b)(7) Aggravating Circumstance in this case under this Court's Decision in Godfrey v. Georgia, the Georgia Courts May Constitutionally Reaffirm the Death Sentence, with No New Sentencing Determination, on the Basis of the (b)(2) Aggravating Circumstance.

The imposition of the death penalty in this case was constitutionally defective under the requirements expressed in Godfrey v. Georgia, 446 U.S. 420 (1980). Although the Superior Court found that the jury's sentencing decision "can rest on (b)(7) alone without offending the Godfrey principle," appendix, p.13a, the record discloses no possible factual basis for the finding of the (b)(7) aggravating circumstance in this case.

Under (b)(7) a person convicted of murder may be sentenced to death if the trier of fact determines that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the victim." Ga. Code § 27-2534.1(b)(7) (1978). As this Court found in Godfrey, the statutory language standing

alone fails to impose any restraint on the arbitrary infliction of the death penalty. "A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980). The validity of the application of (b) (7) in a particular case turns on whether the Georgia Supreme Court has applied a "constitutional construction" of the language of (b)(7). Id. at 432.

No evidence present in this case approaches the "torture" and "depravity of of mind" which are constitutionally required to be the basis of a death penalty recommendation under (b)(7). The emphasis at the trial on evidence of a gruesome scene at the crime and the victim's pitiful plight after the struggle, magnified by improper prosecutorial argument throughout, badly misled this jury as to the proper focus of (b)(7). Moreover, the jury was given no guidance in the trial court's instructions as to the appropriate limits on the application of (b)(7). Finally, the Georgia Supreme Court failed in its mandatory sentence review to limit the construction of (b)(7) as applied in this case to reflect the constitutional boundaries later made clear in Godfrey. 243 Ga. 744, 758, infra, pp. 8a-9a.

The presence of a separate statutory aggravating circumstance--(b)(2), that the murder was committed in the course of a burglary and armed robbery--cannot preserve this death penalty in connection with an impermissible application of (b) (7). The jury here might well have recommended mercy in the

absence of the unfounded and limitless basis for death under (b)(7), that is, that the murder was "vile and horrible."[14/]

Where there is considerable doubt, as there is here, as to whether the jury would have recommended death under constitutionally acceptable conditions, a new sentencing hearing is required. The general principle has been clearly restated in this Court's decision in Hicks v. Oklahoma, 447 U.S. 343 (1980). In Hicks this Court held that when one possible basis for a jury's sentence is found constitutionally defective, the possibility that the jury could have ordered the same extreme penalty (40 years imprisonment in Hicks) on another basis cannot save the sentence--a new sentencing determination is required. The Court stated:

> "Where ... a state has provided for the imposition of criminal punishment in the discretion of the trial jury, ... the defendant has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion."

Id. at 346. The principle obviously has an even more important application where the defendant's life is at stake.

In the instant case, the Superior Court flatly misread a footnote in Godfrey and erroneously held that the (b)(2) circumstance was sufficient to support this death

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14/ Indeed, in the case of a much more egregious robbery/killing in Baldwin County, tried in the same court soon after this case, the jury was instructed on (b)(2) but not (b)(7) and was further instructed that it could consider the youth of the defendant (who was 18) in mitigation. The jury in its sentencing recommendation found that the (b)(2) factor existed but recommended mercy. This is the Evans case, pertinent certified excerpts from which are in the record below. State v. Evans, Baldwin County Superior Court, Case No. 29622 (February 22, 1978).

sentence without any necessity of determining whether a jury actually would have imposed the death penalty if only (b)(2) had been instructed and found. Substantial doubt has thus been resolved by the superior court in favor of the State's speculation that the jury might have imposed the death penalty, even if it had been properly instructed, which it was not. This patently erroneous holding warranted reversal of the superior court's order.

In a case analogous to the case at bar, Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), the jury recommended the death penalty on the basis of three statutory aggravating circumstances. The Georgia Supreme Court later found one of the aggravating circumstances to be unconstitutionally vague but upheld Stephens' sentence as valid based on the remaining two. The Fifth Circuit disagreed and ruled that a writ of habeas corpus should be granted. In his opinion, Judge Roney relied on prior decisions of this Court which establish that, if a jury is instructed to consider alternative grounds for conviction, one of which later proves to be unconstitutional, and the reviewing court is unable to determine whether improper grounds were relied upon, the verdict must be set aside. Stromberg v. California, 283 U.S. 359, 367-68 (1931). Accord Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970); Street v. New York, 394 U.S. 576, 585-88 (1969); Yates v. United States, 354 U.S. 298, 311-12 (1957).

The Fifth Circuit in Stephens indicated that this principle applies with particular force in death penalty cases in light of Furman v. Georgia, 408 U.S. 238 (1972), which prohibits arbitrary and capricious sentencing procedures. The Court concluded that: "It is impossible for a reviewing court to determine satisfactorily that the verdict in this case was

not decisively affected by the unconstitutional statutory aggravating circumstance." Stephens v. Zant, 631 F.2d 397, 406 (1980); accord Burger v. Zant, _____ F.Supp._____ (S.D. Ga. April 29, 1981, No. CV280-114).

In a supplemental brief filed with the Georgia Supreme Court in support of his application for a certificate of probable cause to appeal in this matter, petitioner brought the Stephens case to that Court's attention and re-emphasized this issue. Unfortunately, the Georgia Supreme Court in this case and other post-Godfrey decisions has adopted the erroneous position of the Superior Court in this case, that is, when there is doubt as to what the sentencing jury might have done if constitutionally instructed, the defendant should be executed.

This is an important and recurring issue on which three individual justices of this Court have expressed views. See Westbrook v. Balkcom, 66 L.Ed.2d 298 (1980), denying certiorari in No. 79-6704. The Court should grant certiorari in this case to resolve this important issue on which the Georgia courts and the Fifth Circuit are split.

CONCLUSION

The issues set out above present extremely important questions of federal constitutional law, decided wrongly by the state courts below, and in some ways in conflict with decisions of federal courts. Each of these issues should be settled by this Court.

The grant of certiorari is particularly appropriate in this case in light of the pendency in this Court of Eddings v. Oklahoma, No. 80-5727, and the closely related issues presented in this petition. At the very least, the decision on certiorari should be deferred in this case until Eddings is decided, in that

a remand for reconsideration in light of Eddings may well be appropriate. The complementary nature of the issues here presented, however, suggests that the most appropriate exercise of this Court's discretion would be the granting of this petition.

For the foregoing reasons, Andrew Legare prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

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34444. LEGARE v. THE STATE.

UNDERCOFLER, Presiding Justice.

The appellant, Andrew Phillip Legare, was tried and convicted on charges of armed robbery, burglary, and malice murder, and sentenced to life for armed robbery, twenty years for burglary, and death for murder. He comes to this court on direct appeal and for mandatory review of the death sentence imposed.

I. Summary of the Evidence.

Essentially the evidence was as follows:

Appellant, age 17 years, and Roger Horne, age 18 years, escaped from the Youth Development Center in Milledgeville, Georgia, about 1:30 a.m. on May 27, 1977. They tied their clothes in two bundles and threw them out the window of the building in which they were confined. Later they exited the building from an upper story window by climbing down sheets which had been tied together to form a rope. Both were dressed only in undershorts. Horne climbed down first. Appellant climbed down about ten seconds later. A security guard was alerted by a noise, observed Horne escaping, and gave chase. He stated Horne was carrying some sort of bundle. The guard discontinued the chase and as he turned around appellant had jumped or fallen to the ground and was running off. He stated Horne and appellant disappeared into the bushes about fifty feet apart.

On May 27, 1977, about 12:30 p.m., a neighbor heard a scream from the victim's house and saw a boy get into the victim's car and drive off. He called members of the family who resided elsewhere. They arrived in about fifteen minutes, entered the house, and found the victim on the living room floor bleeding profusely. He had been beaten severely about the head and died about twelve hours later without regaining consciousness. A blood

spattered crowbar and a wooden stick were found under the sofa.

Appellant was apprehended in Tampa, Florida, on June 1, 1977, while driving the victim's car. He testified that after the escape he and Horne came upon the victim's house about dawn. They hid in the woods until about 8 a.m. when they observed the victim drive off in his car. Then they entered the house, took some clothes, drank some milk, and divided $30 which they found in a bureau drawer and kitchen drawer. Appellant trimmed his hair. Appellant stated he had gone to sleep beneath a bed when he heard a car come into the driveway, the door open, and a loud "crack". He went into the living room and observed the victim "on all fours" with a crowbar in his hand with Horne straddling him and beating him with a wooden stick. There was a "good bit of blood" on the floor. Appellant stated he became excited and wanted to get out of there. As he left he saw the victim's car keys on the floor. He picked them up and the victim or Horne bumped the front of his sneaker, he also picked up a jug of water, ran out, and fled in the victim's car. His fingerprints were found in the victim's house. Appellant admitted blood stained sneakers found in the car were his.

Horne testified that after he escaped from the Youth Development Center he did not see appellant again. He thought appellant had been captured by the security guard who chased him. He stated he abandoned appellant's clothes in the woods, put on his state pants and shirt, and kept his personal clothes; that he stayed in the woods that night; the next day he walked down some railroad tracks, changed into his personal clothes, and hitchhiked to Savannah where he was apprehended a week and a half later. His fingerprints were not found at the victim's house. Hair samples found at the victim's house were not Horne's. Horne led police officers to the locations where he discarded certain clothing and a location where he had smoked cigarettes. Police recovered the clothing and evidence of smoking.

II. Enumerations of Error.

1. In Enumeration 1, the appellant alleges: "The court below erred in its charge to the jury on sentencing in that said charge, considered as a whole, did not make it

clear that the jury could recommend mercy, i.e., a life sentence, even if the jury found that the existence of statutory aggravating circumstances had been proven."

We have examined the sentence charge and conclude that it made clear to the jury that it could recommend mercy, i.e., a life sentence even if the jury found that the existence of statutory aggravating circumstances had been proved. *Fleming v. State*, 240 Ga. 142 (240 SE2d 37) (1977); *Hawes v. State*, 240 Ga. 327 (240 SE2d 833) (1977); *Spivey v. State*, 241 Ga. 477 (246 SE2d 288) (1978).

Enumeration 1 is without merit.

2. In Enumeration 2, the appellant alleges, "The court below erred in its charge to the jury on sentencing because the charge was confusing, self- contradictory, and did not include a proper charge on non-statutory mitigating circumstances."

In addition to reading from the statute, the trial court charged the jury, "[n]ow, in arriving at the determination for the punishment for murder you are authorized to consider all the evidence received in court, presented by both the state and the defendant throughout the trial before you. You are authorized to consider the facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment which may have been submitted to you." The trial court also charged "there was no evidence of either aggravation on behalf of the state or mitigation on behalf of the defendant that has been admitted into evidence, except the argument of both, the state, and the defendant." This latter charge obviously referred to the sentencing phase of the trial. We have held that it is not required that the trial court single out mitigating circumstances for consideration of the jury. *Thomas v. State*, 240 Ga. 393 (242 SE2d 1) (1978); *Potts v. State*, 241 Ga. 67 (243 SE2d 510) (1978); *Spivey v. State*, supra.

Enumeration 2 is without merit.

3. In Enumeration 3, the appellant alleges: "The court below erred in its charge to the jury on sentencing by charging repealed Georgia Code Ann. § 27-2534 and failing to charge the substance of Georgia Code Ann. § 27-2503 (b)."

The appellant contends the trial court committed

reversible error by not instructing the jury as follows: "Upon the conclusion of the evidence and the arguments, the judge shall give the jury appropriate instructions, and the jury shall retire to determine whether any mitigating and aggravating circumstances as defined in § 27-2534.1, exist and whether to recommend mercy for the defendant."

The trial court charged the jury that it was their duty "to consider any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence" and that "in arriving at the determination for the punishment for murder you are authorized to consider all the evidence received in court, presented by both the state and the defendant throughout the trial before you. You are authorized to consider the facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment which may have been submitted to you," as well as clearly informing the jury that if they found the defendant guilty of count number one (murder) and statutory aggravating circumstance or circumstances were found by the jury they could recommend mercy or that the defendant's punishment be life imprisonment.

When viewed in the context of the overall charge, *Spivey v. State*, supra, the trial court's charge fully and properly informed the jury that they were authorized to determine the existence of any mitigating or aggravating circumstances, and that they too were authorized to make a recommendation of mercy for the defendant, in reaching their decision on the issue of punishment. This accords with this court's decisions in *Fleming*, *Hawes*, and *Spivey*, supra.

Enumeration 3 is without merit.

4. In Enumeration 4, the appellant alleges: "The trial court erred in submitting to the jury two statutory aggravating circumstances."

The trial court charged the jury on three statutory aggravating circumstances. The appellant's objection is directed to the following two: "1. That the offense of murder was committed while the offender was engaged in the commission of another capital offense, to wit, armed

robbery. 2. That the offense of murder was committed while the offender was engaged in the commission of burglary."

Appellant contends that the crimes of armed robbery and burglary are lesser included offenses of the crime of murder under the facts of this case and these crimes merged into the conviction for murder; that they were "figuratively exhausted," and could not serve as statutory aggravating circumstances to predicate a recommendation of death as punishment.

In *Stanley v. State*, 240 Ga. 341 (241 SE2d 173) (1977) this court held that a second crime, such as armed robbery, may be used as an aggravating circumstance for imposition of the death penalty, and that a lesser included offense may constitute an aggravating circumstance, even though it may not be punished separately. See *Pryor v. State*, 238 Ga. 698 (234 SE2d 918) (1977). This case does not involve mutually supporting aggravating circumstances and the case of *Gregg v. State*, 233 Ga. 117 (210 SE2d 659) (1974) is not applicable.

Enumeration 4 is without merit.

5. In Enumeration 5, the appellant alleges: "The court below erred in refusing appellant's requested charge for a special verdict."

The appellant contends that the jury did not specify in its verdict whether they found appellant guilty of malice murder, or murder on a conspiracy theory, and there exists the possibility that appellant was found guilty on a conspiracy theory, and, if so, his resulting death sentence is disproportionate to the crime committed. We disagree. Appellant was found guilty of malice murder. He is equally guilty whether he did the actual killing or the killing was the probable consequences of the conspiracy. Whether the sentence of death is disproportionate to the crime is addressed hereafter in Division III "Sentence Review." Enumeration 5 is without merit.

6. In Enumeration 6, the appellant alleges: "The court below erred in overruling appellant's motion to declare the death penalty unconstitutional and in imposing that penalty on appellant."

This court and the Supreme Court of the United

States have upheld the constitutionality of the Georgia death penalty statute in a number of cases and the appellant has advanced no new reason for us to reconsider our position. *Coley v. State*, 231 Ga. 829 (204 SE2d 612) (1974); *Young v. State*, 237 Ga. 852, 856 (230 SE2d 287) (1976); *Moore v. State*, 240 Ga. 807, 813 (243 SE2d 1) (1978); Gregg v. Georgia, 428 U. S. 153 (96 SC 2909, 49 LE2d 859) (1976).

Enumeration 6 is without merit.

7. In Enumeration 7 the appellant alleges: "Under the facts of this case and the charge of the trial court to the jury, armed robbery and burglary were lesser included offenses of murder, and the convictions for same must be set aside."

We do not agree. The jury found the appellant guilty of malice murder, armed robbery, and burglary. It found the murder was committed while the appellant was engaged in the commission of armed robbery and burglary. It found also that the murder was outrageous, wanton, horrible, or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. It assessed the death penalty for the murder. The findings and verdicts are supported by the evidence. "Verdicts are to have a reasonable intendment and are to receive a reasonable construction, and are not to be avoided unless from necessity." Code Ann. § 27- 2301. In our opinion the verdicts of guilty, the aggravating circumstances which were found, and the imposition of the death penalty show clearly the jury determined that the appellant was a party to the crime of murder. Accordingly, the crimes of burglary and armed robbery are not included offenses. See *Potts v. State*, 241 Ga. 67, 77 (11), supra. Enumeration 7 is without merit.

8. In Enumeration 8 the appellant alleges: "The court below erred in overruling appellant's motion for a continuance on the basis of the state's last minute amendment to the list of witnesses."

After the voir dire of witnesses had been completed, the prosecution, having discovered that Dr. Smithson, whose name had been provided on the list of witnesses would not appear, presented the name of nurse Barbara Schipani as a substitute witness. Counsel for appellant

made a motion that nurse Schipani not be allowed to testify, or that the defense be granted a continuance in order to investigate the witness' proposed testimony.

The court ruled that the witness would be allowed to testify but that appellant's counsel would be given an opportunity to interrogate the witness prior to her testimony. There is no indication that the appellant moved for a mistrial and the record is silent on whether counsel did in fact interrogate her before she testified.

Code Ann. § 27-1403 provides in part: "Without the consent of the defendant, no witness shall be permitted to testify for the state whose name does not appear upon the list of witnesses as furnished to the defendant unless the solicitor or prosecuting attorney shall state in his place that the evidence sought to be presented is newly-discovered evidence which the state was not aware of at the time of its furnishing the defendant with a list of the witnesses."

The appellant's objection being made in the alternative and having been granted the opportunity to interrogate the witness before she testified, we cannot say the trial court erred. *Brown v. State*, 235 Ga. 644, 646 (220 SE2d 922) (1975); *Yeomans v. State*, 229 Ga. 488 (1) (192 SE2d 362) (1972).

Enumeration 8 is without merit.

9. In Enumeration 9, the appellant alleges: "The court below erred in excluding veniremen conscientiously opposed to the death penalty."

Appellant does not contest that the veniremen excused made it unmistakably clear that they would vote against imposition of the death penalty in any and all circumstances. Rather the thrust of his argument is that excuse of such persons without coincidental exclusions of all veniremen who might be prejudiced in favor of guilt or of capital punishment denies appellant's rights to an impartial jury and fair trial under Sixth Amendment as applicable to the states by incorporation through the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

This contention has been rejected in earlier cases by this court and the Supreme Court of the United States. *Smith v. Hopper*, 240 Ga. 93 (239 SE2d 510) (1977); *Porter*

v. State, 237 Ga. 580 (229 SE2d 384) (1978). Enumeration 9 is without merit.

10. In Enumeration 10 the appellant alleges: "The court below erred in allowing the state to ask certain questions concerning capital punishment to all veniremen as a group after several veniremen had been individually polled and qualified."

The appellant cites the general guidelines provided in Code Ann. §§ 59-705 and 59-809 in support of his position.

In *Whitlock v. State*, 230 Ga. 700, 706 (198 SE2d 865) (1973), this court said, "The single purpose for voir dire is the ascertainment of the impartiality of jurors, their ability to treat the cause on the merits with objectivity and freedom from bias and prior inclination. The control of the pursuit of such determination is within the sound legal discretion of the trial court, and only in the event of manifest abuse will it be upset upon review." Where, as here, there was an indication that the general questions had not been heard we find no abuse by the trial court in permitting questioning on matters contained in the general questions even though some veniremen had been questioned individually. *Welch v. State*, 237 Ga. 665 (229 SE2d 390) (1976); *Gatlin v. State*, 236 Ga. 707 (225 SE2d 224) (1976). Enumeration 10 is without merit.

11. In Enumeration 11 the appellant alleges: "The court below erred in allowing the jury to disperse without consent of counsel for defendant after having been sworn in as jurors," and in Enumeration 12 he alleges, "The court below erred in failing to grant a new trial after appellant showed that jurors had been allowed to disperse, that some jurors had unsupervised contacts with persons other than bailiffs and that other jurors while unsupervised had opportunities for impermissible contacts."

Code Ann. § 59-718.1 provides: "At any time during the trial of a civil or criminal case, either before or during jury deliberation, the judge may, in his discretion, allow the jury to be separated and the members thereof dispersed under appropriate instructions, except in capital cases."

It is clear from the record that the appellant did not

consent to any dispersal. The dispersal was for the purpose of securing personal items necessary for the jurors to use while being sequestered during the trial.

Violation of the quoted Code section or the possibility of an unauthorized contact or communication involving a juror, would not automatically demand that appellant be granted a new trial. In *Whitlock v. State*, supra, at pp. 701-702, this court stated: "Whenever the union and isolation of the jury have been broken, there arises a legal presumption that the defendant has been injured, and 'it (is) incumbent upon the state to have rebutted that legal presumption, not only by evidence that the juror did not speak to anyone himself, nor did anyone speak to him about the case, but that he did not hear anyone . . . express any opinion in relation to the case,' " (citing *Daniel v. State*, 56 Ga. 653, 655 (1876)).

The bailiffs testified at a post-trial hearing that they did not allow and were not aware of any authorized contact or communications involving the jurors who composed appellant's jury and every member of appellant's jury testified under oath that they never disobeyed the court's instructions that they not discuss appellant's case, allow any one to discuss it in their presence, nor did they hear anyone express any opinion in regards to appellant's case.

The state carried the burden of rebutting any presumption of harm or prejudice to the defendant.

Enumerations 11 and 12 are without merit.

12. In Enumeration 13 the appellant alleges: "During the trial, jurors were allowed to view appellant in handcuffs outside the courtroom. The court below erred in overruling a motion for new trial made on this ground."

It appears to be uncontested that two or three jurors inadvertently noticed the appellant entering the sheriff's automobile while handcuffed, during a recess at some point during the trial. The jurors testified during the hearing on the appellant's motion for a new trial that they were not prejudiced against appellant, that their deliberations in the case were not affected in any way by what they saw.

There was no exhibiting of the accused in chains to the court and the incident does not appear to have been of

such significance as to be noted during the course of the trial. Under these circumstances, the cases cited by the appellant in support of his contention, Estelle v. Williams, 425 U. S. 501 (96 SC 1691, 48 LE2d 126), reh. den. 426 U. S. 954 (96 SC 3182, 49 LE2d 1194) (1976), and *McKenzey v. State*, 138 Ga. App. 88 (225 SE2d 512) (1976) have no application. Enumeration 13 is without merit.

13. In Enumeration 14, the appellant alleges: "The court below erred in sustaining an objection by the state to certain questions asked of Milledgeville Police Officer Ralph Starley."

State's witness Ralph Starley, a police officer, testified on direct examination that upon arrival at the victim's residence, he and other officers proceeded cautiously around the house before breaking in to help Mr. Hill because they believed a burglar might still be in the house. He stated on cross examination that Marvin Jones, a neighbor, had seen "subjects" entering the premises. Counsel for appellant attempted to ask further questions regarding this statement of Marvin Jones in order to discover the reason behind the witness' belief that one of the subjects might still be in the house. The court sustained the objection on the ground that the statement of Marvin Jones would be hearsay.

This court has consistently held in accord with the trial court's ruling. As early as *Kelly v. State*, 82 Ga. 441 (1887), this court addressed the issue of the admissibility of a conversation of a witness with a third person, where the purpose of proving the conversation is merely to show inducement, or conduct: "... we think it would have been more regular to admit only the fact that a conversation occurred, without going into the particulars of what was said. The fact itself was all that was needed to show inducement, and certainly the conversation was not admissible for any other purpose." Accord, *McNeal v. State*, 228 Ga. 633, 637 (187 SE2d 271) (1972); *Lingo v. State*, 226 Ga. 496, 498 (175 SE2d 657) (1970).

Marvin Jones appeared and testified at appellant's trial but the appellant did not question him on this point.

Enumeration 14 is without merit.

14. In Enumeration 15 the appellant alleges: "The court below erred in refusing appellant's motion at trial

for discovery of written statements of Marvin Jones, a key witness of the prosecution."

At no point in the trial does it appear that there was indeed a written statement of Marvin Jones. At most it appears that a police summary may have made some reference to Jones' statements to the police. At issue appears to be the question of whether Jones told the police that there were "suspects" rather than "a suspect" in the house where the crime occurred and whether he said he saw a person leave the house before the appellant left.

In *Dickey v. State*, 240 Ga. 634, 636 (242 SE2d 55) (1978) this court said: "A defendant assigning error upon the denial of a 'Brady motion' must do more than show suppression. Moore v. Illinois, 408 U. S. 786, 795-798 (92 SC 2562, 33 LE2d 706) (1972); *Hicks v. State*, 232 Ga. 393, 396 (207 SE2d 30) (1974); *Pryor v. State*, 238 Ga. 698, 706 (234 SE2d 918) (1977). See United States v. Harris, 458 F2d 670, 677 (5th Cir., 1972); United States v. Crow Dog, 532 F2d 1182, 1189 (8th Cir., 1976). A defendant assigning error upon the denial of a 'Brady motion' and suppression of an inconsistent statement by a key prosecution witness must show that '. . . the suppressed evidence might have affected the outcome of the trial.' United States v. Agurs, 427 U. S. 97 (96 SC 2392, 49 LE2d 342) (1976)."

The Agurs case established "[i]f there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial."

In the instant case the evidence is overwhelming that the appellant was in the victim's house and in possession of the victim's property. Under these circumstances we find no justification for a new trial on this issue. Enumeration 15 is without merit.

15. In Enumeration 16, the appellant alleges: "The trial court erred in requiring the District Attorney to make a statement to the jury revealing any alleged agreement with state's witness Roger Loring Horne, and thereafter allowing the District Attorney to make a prejudicial statement to the jury concerning his inability to find evidence linking Horne to the crimes of which appellant was accused rather than making the required

statement."

We note at the outset that the appellant made no objection at trial to the statement by the district attorney. In fact, although the district attorney and counsel for Horne both asserted no promise had been made to Horne, the appellant's counsel insisted that the statement by the district attorney clearly showed the existence of an agreement made in exchange for Horne's testimony with the following argument:

"Mr. Dickens: Your Honor, of course, what has been said here clearly indicates this. That the district attorney has, in effect, indicated to Horne through his attorney that if all goes well in this trial from the state's standpoint, he won't be tried. His case will be nol prossed. If that isn't a promise, if that isn't an inducement, there has never been an inducement made in the whole country."

Under these circumstances it was proper for the district attorney to repeat the statement. Not only will the failure to interpose a timely objection at trial preclude consideration of an objection raised for the first time on appeal (*Clenney v. State*, 229 Ga. 561, 563 (192 SE2d 907) (1972)), but "A defendant will not be allowed to induce an asserted error, sit silently by hoping for an acquittal, and obtain a new trial when that tactic fails." *Hill v. State*, 237 Ga. 523 (228 SE2d 898 (1976); *Edwards v. State*, 235 Ga. 603, 604 (221 SE2d 28) (1975).

Enumeration 16 is without merit.

16. In Enumeration 17 the appellant alleges: "The court erred in sustaining the state's objection to the appellant's attempt to impeach co-indictee Roger Horne, through the use of statements made in connection with a polygraph examination," and in Enumeration 18, that "The court below erred in sustaining the state's objection to appellant's questions to co-indictee Roger Horne which tended to show Horne's unreliability by virtue of the results of a polygraph examination."

In *State v. Chambers*, 240 Ga. 76 (239 SE2d 324) (1977) this court held on express stipulation by the parties, the results of a polygraph examination may be admitted into evidence. There was no stipulation of the parties in this case and the appellant abandoned the issue

when left open by the trial court saying, "Your Honor, insofar as the defendant is concerned, we are not pursuing that subject."

Enumerations 17 and 18 are without merit.

17. In Enumeration 19 the appellant alleges: "The court below erred in instructing the jury on the admissibility of evidence concerning serological tests."

The state failed to connect up with a complete chain of custody blood samples taken from the victim, the appellant and Roger Horne. There was also testimony that blood was of human origin and the type of the same on the clothing, shoes, stick, crowbar, and any other specific objects delivered to the Crime Lab, either found in the home of George W. Hill, Sr., or in the custody of the defendant and submitted to the State Crime Lab for examination. The court ruled out and instructed the jury to disregard the tests where the state had failed to connect up with a chain of custody and permitted consideration of the tests on the clothing, shoes, stick, crowbar, and other specific objects delivered to the Crime Lab, either found in the home of George W. Hill, Sr., or in the custody of the defendant and submitted to the State Crime Lab for examination.

It was material and relevant in each instance that the blood was human blood. Although the types may have been of no significance, it was important that they were typable as human blood and that they did or did not come from the same person.

The cautionary charge of the court, repeated in the final charge was proper. Additionally, the appellant has not demonstrated any harm or prejudice to himself. *Chenault v. State*, 234 Ga. 216, 220 (215 SE2d 223) (1975).

Enumeration 19 is without merit.

18. In Enumeration 20, the appellant alleges: "The trial court improperly denied appellant a twenty-four hour continuance in order to investigate the possibility of another cause of death of the victim."

The request for a continuance was withdrawn by appellant's counsel at trial and this enumeration is without merit.

19. In Enumeration 21, the appellant alleges: "The court below erred in denying appellant's motion for a

directed verdict made on the ground that the state failed to prove that appellant caused the death of George Hill, the alleged victim named in the indictment."

The evidence was sufficient to support a verdict, and it was not error for the trial court to refuse to direct a verdict of acquittal. *Stamper v. State*, 235 Ga. 165, 170 (219 SE2d 140) (1975); *Cunningham v. State*, 235 Ga. 126 (218 SE2d 854) (1975).

20. In Enumeration 22, the appellant alleges: "The court below erred in sustaining the state's objection to the introduction of a full transcript of appellant's statement to police, parts of the statement having been previously used by the prosecution for the purpose of impeachment."

The trial court ruled, "And for the purposes of the record, I would like to state that the court is not preventing you from going into the exact detail with this defendant as to what statement, if any, he made in Tampa. I'm simply stating that I am not admitting the instrument into evidence."

Appellant argues in his brief, "It is well settled ' . . . that where an effort is made to impeach a witness by proving contradictory statements made in a conversation which occurred previously to the trial, it is competent to sustain the witness by bringing out the whole of that conversation, in order that the true drift and meaning of what was then said by him may be correctly understood.' *Lowe v. State*, 97 Ga. 792, 794 (25 SE 676) (1895); *Smalls v. State*, 105 Ga. 669 (31 SE 571) (1898); *Parrish v. State*, 88 Ga. App. 881 (78 SE 366) (1953). In *Parrish*, supra, at p. 882, the Court of Appeals, reviewing the admissibility of a statement made by the defendant at the time of his arrest, states: 'If it was not the entire conversation which took place, or did not embody the entire substance of the previous oral declarations, the State was not required to show *verbatim* all that transpired, but the defendant was at liberty to do so if he desired.' "

It is clear that the trial court was permitting a *verbatim* showing by instructing appellant's counsel that "the court is not preventing you from going into the *exact* detail with this defendant as to what statement if any, he

made in Tampa."

Enumeration 22 is without merit.

21. In Enumeration 23, the appellant alleges: "The trial court erred in denying appellant's motion for a new trial."

In support of this enumeration the appellant asserts the general grounds and urges in support thereof the prior enumerations and the arguments made.

We do not find that the trial court erred in any manner enumerated and did not err in denying appellant's motion for a new trial on the general grounds.

Appellant's other enumerations alleging that the death penalty was imposed under influence of passion, prejudice and other arbitrary factors and the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering the crime and the defendant are matters that will be considered in our review of the death sentence.

III. Sentence Review.

Our sentence review has included consideration of the aggravating circumstances found by the jury and the evidence introduced in court concerning the crime and the defendant. After a review of the record and transcript, we conclude that the sentence of death imposed on Andrew P. Legare was not imposed under the influence of passion, prejudice or any other arbitrary factor. Code Ann. § 27-2537 (c) (1).

1. The offense of murder was committed while the offender was engaged in the commission of another capital offense, to wit, armed robbery. Code Ann. § 27-2534.1 (b) (2).

2. That the offense of murder was committed while the offender was engaged in the commission of a burglary. Code Ann. § 27-2534.1 (b) (2).

3. The offense of murder was outrageously and wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1 (b) (7).

We have reviewed the instructions given by the trial court on sentencing and find that they are not subject to the defects addressed in *Fleming v. State*, supra, and *Hawes v. State*, supra.

8a

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the cases listed in the appendix support affirmance of the death penalty.

There is evidence to establish that the appellant broke into the victim's home, ransacked it, and lay in wait for the victim's return, then brutally beat him to death, took his automobile and made his getaway.

Andrew Legare's sentence to death for murder is not excessive or disproportionate considering both the crime and the defendant. Code Ann. § 27-2537 (c)(3). The verdict is factually supported.

Judgment affirmed. All the Justices concur.

ARGUED FEBRUARY 20, 1979 — DECIDED MAY 31, 1979 — REHEARING DENIED JUNE 22, 1979.

Murder, etc. Baldwin Superior Court. Before Judge Duke.

G. L. Dickens, Jr., for appellant.

Joseph H. Briley, District Attorney, Arthur K. Bolton, Attorney General, William B. Hill, Jr., Staff Assistant Attorney General, for appellee.

APPENDIX.

House v. State, 232 Ga. 140 (205 SE2d 217) (1974); *Gregg v. State*, 233 Ga. 117 (210 SE2d 659) (1974); *Floyd v. State*, 233 Ga. 280 (210 SE2d 810) (1974); *Chenault v. State*, 234 Ga. 216 (215 SE2d 223) (1975); *Smith v. State*, 236 Ga. 12 (222 SE2d 308) (1976); *Birt v. State*, 236 Ga. 815 (225 SE2d 248) (1976); *Coleman v. State*, 237 Ga. 84 (226 SE2d 911) (1976); *Isaacs v. State*, 237 Ga. 105 (226 SE2d 922) (1976); *Dungee v. State*, 237 Ga. 218 (227 SE2d 746) (1976); *Banks v. State*, 237 Ga. 325 (227 SE2d 380) (1976); *Young v. State*, 239 Ga. 53 (236 SE2d 1) (1977); *Gaddis v. State*, 239 Ga. 238 (236 SE2d 594) (1977); *Peek v. State*, 239 Ga. 422 (238 SE2d 12) (1977); *Bowden v. State*, 239 Ga. 821 (238 SE2d 905) (1977); *Westbrook v. State*, 242 Ga. 151 (249 SE2d 524) (1978); *Finney v. State*, 242 Ga. 582 (250 SE2d 388) (1978); *Davis v. State*, 242 Ga. 901 (242 SE2d 443) (1979); *Spraggins v. State*, 243 Ga. 73 (252

SE2d 620) (1979).

34477. CARROLL CITY/COUNTY HOSPITAL AUTHORITY v. COX ENTERPRISES.

BOWLES, Justice.

We granted certiorari in this case to determine the proper venue of libel actions brought in the State of Georgia against corporate publishers. Under the Court of Appeals' decision, (*Carroll City/County Hospital Authority v. Cox Enterprises*, 147 Ga. App. 863 (250 SE2d 550) (1978), venue in a libel action against a corporate publisher can be maintained only where the libelous publication is first exposed to public view. In so holding, the Court of Appeals stated that this result was demanded by *Rives v. Atlanta Newspapers, Inc.*, 110 Ga. App. 184 (138 SE2d 100) (1964), revd. on cert., 220 Ga. 485 (139 SE2d 395) (1964), conformed to on remand, 111 Ga. App. 6 (140 SE2d 304) (1965), in which the single publication rule was adopted as the law of the state.

Under English and American common law, every sale of a single copy of a newspaper was a distinct publication. As a result, a large number of separate suits could be instituted against a newspaper based upon any one defamatory story. Prosser on Torts, § 113 (4th Ed. 1971). Some form of a single publication rule has now been adopted in most American jurisdictions to avoid this situation.

The purpose of the single publication rule is to protect newspaper defendants and the courts from a multiplicity of suits and an almost endless tolling of the statute of limitations. Its goals can be accomplished by requiring a plaintiff to collect all of his damages in one action, and establish that the statute of limitations is to run from the date of initial publication. The rule is a device by which a widely circulated libel is litigated in one trial, a convenient fiction to simplify litigation and prevent a multiplicity of suits.

The single publication rule need not and should not, however, have any bearing on venue. While the rule may

determine venue in the sense that there shall be only one trial, there is no logical basis for employing the single publication rule as a method of determining the site of the trial. See Note, The Single Publication Rule in Libel: A Fiction Misapplied, 62 Harv. L. Rev. 1041, 1046-1047 (1949); Note Uniform Single Publication Act, 44 Calif. L. Rev. 146, 151-152 (1956). The holding of this court in *Rives v. Atlanta Newspapers, Inc.*, 220 Ga. 485 (139 SE2d 395) (1964), went no further than to judicially establish the single publication rule in Georgia. It did not establish the venue of such actions as being any different from the venue established by our Constitution and by statute for other torts. If a libel action is brought against a non-corporate newspaper, the venue would, by constitutional mandate, have to be brought in the county of residence of the libeler, which may not be the county where the newspaper is published. Code Ann. § 2-4306.

Code Ann. § 22-404 (d) provides that corporations may be sued for damages because of torts in the county where the cause of action originated, if the corporation has an office and transacts business in that county. We construe this Code section to permit venue of a civil action for libel against a corporate publisher to be laid in any county in which the newspaper is circulated, provided the corporation has an office and transacts business in that county. In accord: Tingley v. Times-Mirror Co., 144 Cal. 205 (77 P 918) (1904); Shores v. Chip Steak Co., 130 Cal. App. 2d 627 (279 P2d 595) (1955); Firstamerica Development Corp. v. Daytona Beach News-Journal Corp., 196 S2d 97 (Fla. 1966); Dyer v. Davis, 189 S2d 678 (La. App. 1966); State v. District Ct., 129 Okla. 210 (264 P 154) (1928).

Unlike those injured by other torts, a person libeled suffers possible injury in every county where the libel has been distributed. Therefore, a separate injury may originate in many different counties. Presumably, the person libeled suffers the greatest injury in his home community. In some cases, the person libeled will be harmed only in the county of his residence, the only place he is known. While the single publication rule permits only one suit to be filed against the tortfeasor newspaper for the entire issue of the story, it should not be applied to

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

PHILLIP ANDREW LEGARE,	:	
	:	
PETITIONER	:	
	:	CASE NO. 4557
VS.	:	
	:	HABEAS CORPUS
WALTER D. ZANT,	:	
SUPERINTENDENT	:	
GEORGIA DIAGNOSTIC	:	
AND CLASSIFICATION	:	
CENTER,	:	
	:	
RESPONDENT	:	

O R D E R

This Habeas Corpus Petition challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Baldwin County, Georgia. The Petitioner alleges that such restraint and imposition violate his rights under the Constitution of the United States and under the Constituion and laws of the State of Georgia. On November 24, 1977, Petitioner was convicted in the Superior Court of Baldwin County of Murder, Armed Robbery and Burglary. He was sentenced that day to death by electrocution for the Murder, life imprisonment for the Armed Robbery, and twenty (20) years imprisonment for the Burglary. The Supreme Court of Georgia affirmed Petitioner's convictions and death sentence. Legare v. State, 243 Ga. 744 (1979). His petition for

certiorari in the Supreme Court of the United States (No. 79-5391) was denied. Legare v. Georgia, 48 U.S.L.W. 3372 (1979).

Although this Petition asserts sixteen counts, evidence and argument were presented on only three, and the others are deemed waived.

The record in this habeas case consists of the transcript and record of Petitioner's trial and the transcript and record of this habeas proceeding.

1.

Petitioner contends that under the Standards announced in Godfrey v. Georgia, 48 U.S.L.W. 4541 (May 19, 1980), the death penalty was imposed in this case in violation of his rights under the Eighth and Fourteenth Amendments of the United States Constitution.

FINDINGS OF FACT

The jury found the Petitioner guilty of Armed Robbery and Burglary in addition to Murder. (See T.T., pps. 812-813). During the sentencing phase, the jury was charged on two statutory aggravating circumstances in addition to the trial court's charge on Ga. Code Ann. §27-2534.1(b)(7). The charge was as follows:

> "...(2) The offense of murder was committed while the offender was engaged in the commission of another capital felony, or the offense of murder was committed while the offender was engaged in the commission of burglary."
> (Trial Transcript, pps. 812-813).

Under this charge, the jury found that the murder had been committed while the Defendant was engaged in the commission of an Armed Robbery and Burglary. Upon the findings of these two statutory aggravating circumstances, as well as the (b)(7) circumstance, the jury sentenced the Petitioner to death by electrocution. (See Trial Transcript, p. 835).

CONCLUSIONS OF LAW

The United States Supreme Court recently held that Ga. Code Ann. §27-2534(b)(7) was unconstitutionally vague where there was no clarifying construction in either the trial court's instructions or in the sentence review by the Georgia Supreme Court. Godfrey v. Georgia, ____ U.S.____, 48 U.S.L.W. 4541 (May 19, 1980). Godfrey involved a case where the sole aggravating circumstance was the (b)(7) element of "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." It is this statutory aggravating ground that the Supreme Court held to be unconstitutionally vague without some narrowing or clarifying instruction from either the trial court or the state Supreme Court. The Court specifically reserved judgment on the issue of whether the death penalty imposed on other statutory aggravating grounds in addition to the (b)(7) circumstance would withstand constitutional scrutiny.

In a footnote on page 12 of the slip opinion the Court states:

"The sentences of death in

> this case rested exclusively on §(b)(7). Accordingly, we intimate no view as to whether or not the petitioner might constitutionally have received the same sentence on some other basis...."

Thus, the Supreme Court has reserved for a later time a decision on the issue of whether the existence of (b)(7) grounds for the imposition of the death penalty along with the simultaneous commission of another felony would pass constitutional muster. For this reason, the Petitioner's contention that his sentence was unconstitutionally imposed in light of Godfrey cannot be sustained since Petitioner was found guilty of two other aggravating circumstances: armed robbery and burglary.

Assuming, however, that the death penalty cannot stand with armed robbery and burglary as the supporting aggravating circumstances, the Court is nevertheless of the view that this case can rest on (b)(7) alone without offending the Godfrey principle. The victim in this case was severely beaten in a manner that supports a finding of torture and aggravated battery to the victim. Legare's own testimony at the habeas hearing [See H.T., pp. 144-145] confirmed what circumstantial evidence had shown at trial - that the killing was brutal and involved a maniacal kind of beating that continued long after the victim had been rendered helpless.

This contention of Petitioner is, therefore, without merit.

Petitioner contends that the imposition of the death sentence violated the Petitioner's Sixth, Eighth and Fourteenth Amendment rights because the jury was prevented from considering important factors in mitigation.

FINDINGS OF FACT

The trial judge's instructions to the jury during the sentencing phase are set out at pages 819-831 of the trial transcript. All of these instructions are made a part of this Court's finding on this issue. The trial court made several references in its charge that the jury was to consider both mitigating and aggravating circumstances. At one point, the trial court charged as follows:

> "Now in arriving at the determination for the punishment for murder you are authorized to consider all the evidence received in court, presented by both the State and the Defendant throughout the trial before you. You are authorized to consider the facts and circumstances, if any, in extenuation, mitigation, or aggravation of punishment which may have been submitted to you."
> (T.T., p. 820).

An examination of the record reveals that of the 43 prospective jurors subjected to voir dire on the issue of whether the age of the Defendant

would prevent them from sentencing the Defendant to death, only one indicated that she would not be able to impose the death penalty because of the Defendant's age. (Voir Dire Transcript, pp. 26-259). She was not excused for cause.

The trial counsel for the Petitioner did not introduce any evidence on behalf of the Petitioner relating to possible mitigating circumstances at the sentencing phase of the trial. He did, however, give argument.

CONCLUSIONS OF LAW

The Court's charge during the sentencing phase of the trial, while not a model of clarity, did instruct the jury that they should consider mitigating circumstances and that they could recommend a life sentence even though an aggravating circumstance was found. (T.T. 831). The charge, therefore, comports with statutory and constitutional requirements. See Spivey v. State, 241 Ga. 477 (1978); Fleming v. State, 240 Ga. 142 (1977); Hawes v. State, 240 Ga. 327 (1977).

The Petitioner contends that the prosecutor illicited promises from the prospective jurors by questioning them as what effect the age of the Defendant would have on their decisions of guilt and sentencing. Under decisions by the Georgia Supreme Court and the United States Supreme Court, the jury must be allowed to consider mitigating circumstances. Jurek v. Texas, 428 U.S. 262, 271 (1976); Gregg v. Georgia, 428 U.S. 153, 197 (1976); Lewis v. State, _____ Ga. ____ (No. 35997, decided July 1, 1980). Age (youth) is a mitigating

circumstance. Lewis v. State, supra (slip opinion at page 5).

However, Lewis involved a situation where the veniremen who indicated that the Defendant's age would preclude them from considering the death penalty were excused for cause. The record in the case sub judice demonstrates that only one of the jurors questioned on the subject of the Defendant's age indicated she could not give the death sentence because of the Defendant's age. She was not excused for cause (see Voir Dire Transcript, p. 93). Thus, the rationale in Lewis based on Witherspoon v. Illinois, 391 U.S. 510, 522 f.n. 21 (1968) is inappropriate here.

Under the analysis above, the question by the prosecutor on the mitigating factor of age did not render the jury impaneled to try the Defendant constitutionally infirm. For this reason, this contention by the Petitioner is without merit.

Petitioner also contends that the failure of the trial counsel to present any evidence in mitigation resulted in the unconstitutional imposition of the death penalty. Petitioner asserts that the ineffectiveness of the trial counsel was one of the reasons no evidence was presented.

Under the decision of MacKenna v. Ellis, 280 F.2d. 592, 599 (5th Cir. 1960), the Fifth Circuit Court of Appeals interpreted the right to counsel to mean "not errorless counsel, and counsel judged to be ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Accord, see Hawes v. State, 240 Ga. 327,

329 (1977); Pitts v. Glass, 231 Ga. 638, 639 (1974). Under this guideline, trial counsel's failure to present evidence in mitigation at the sentencing phase cannot be said to be ineffective. In addition, the closing argument of Mr. Dickens was perhaps the best possible plea for mercy. (See Argument Transcript, pp. 79-87). The decision not to present any witnesses was clearly a tactical one based on counsel's evaluation of the strength of the witnesses available. (See Habeas Transcript, pp. 92-94).

This contention is also without merit.

3.

Petitioner contends that his Eighth and Fourteenth Amendment rights were violated in this case by the absence of meaningful prosecutorial discretion in the decision to seek the death penalty and by prosecutorial misconduct.

FINDINGS OF FACT

There have been per capita, more death sentences sought and obtained in the Ocmulgee Judicial Circuit than in other areas of Georgia.

While it was suggested that there may have been some kind of inverse racial motivation for the decision to seek the death penalty in Petitioner's case (Habeas Transcript, p. 101), the Court cannot, based on the evidence presented, make any such finding.

CONCLUSIONS OF LAW

No probative evidence was presented by the Petitioner on this contention. It is axiomatic that the burden rests on the habeas petitioner to

make out his case. Sims v. Smith, 228 Ga. 136 (1971). Further, the Supreme Court has, as a part of its sentence review, determined that this death penalty is not disproportionate to other cases. Legare v. State, 243 Ga. 744, 759 (1979).

This contention is also without merit.

CONCLUSION

WHEREFORE, no constitutional rights of the Petitioner having been violated the Petition is denied as to both the conviction and the sentence.

SO ORDERED, this 13th day of October, 1980.

R. ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 1444

SUPREME COURT OF GEORGIA

ATLANTA. February 24, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

ANDREW PHILLIP LEGARE V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk